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AO 243 (Rev. 5/85)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT JUDGMENT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District Western District of Washington
Name of Movant Andres Hernandez-Vargas	Prisoner No. 38887-086	Case No. C11-5957 RBL
Place of Confinement Federal Correctional Complex, PO BOX 9000 Forrest City, AR 72336		

UNITED STATES OF AMERICA

v. **ANDRES HERNANDEZ-VARGAS**

(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack **U.S. District Court
Western District of Washington, Tacoma Division**
2. Date of judgment of conviction **09-04-2009** Case No. **3:08CR05775RBL-001**
3. Length of sentence **240 Months U.S. BOP, Supervised Release Term of 10 years**
4. Nature of offense involved (all counts) **21 U.S.C. §851, 841(a)(1), and 841(b)(1)**

5. What was your plea? (Check one)

- (a) Not guilty ☒
- (b) Guilty ☐
- (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

- (a) Jury ☒
- (b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐**Appeal No. 09-30336**

11-CV-05957-M

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9. If you did appeal, answer the following:

- (a) Name of court U.S. Court of Appeals for the Ninth Circuit
- (b) Result Affirmed
- (c) Date of result 07-15-2010

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes ☒ No ☐

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court U.S. Supreme Court(2) Nature of proceeding petition for certiorari No. 10-7074(3) Grounds raised Unknown

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information: N/A

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

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(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☒
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

The U.S. Supreme Court is the highest Court in the land.

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

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- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: **CONVICTION OBTAINED BY USE OF EVIDENCE GAINED PURSUANT
TO AN UNCONSTITUTIONAL SEARCH AND SEIZURE.**

Supporting FACTS (state *briefly* without citing cases or law): On October 16, 2008, Police installed a "GPS" tracking device on Movant's vehicle without a valid warrant and without Movant's consent, also the installation of the "GPS" was performed without the approval of a neutral magistrate. Further on October 18, 2008, after a traffic stop, Police searched the vehicle twice without Movant's consent while the Movant was restrained with handcuffs in the Patrol vehicle. A third search was conducted, meanwhile Movant was at the County jail. A search conducted without a warrant is "per se" unreasonable under the Fourth Amendment.

B. Ground two: **CONVICTION OBTAINED BY USE OF EVIDENCE OBTAINED PURSUANT
TO AN UNLAWFUL ARREST.**

Supporting FACTS (state *briefly* without citing cases or law): On October 18, 2008, Police saw Movant's truck driving at mile post 120 on northbound I-5, Police paced the Movant's truck at over 70 M.P.H. for about a mile, then Police activated the emergency lights. Movant pulled the truck to the side of the Interstate, so a traffic stop was performed. Without reading Movant his Constitutional rights, Movant was arrested and confined to Federal I.C.E. custody. Continued detention after the traffic stop was unreasonable under the Fourth Amendment.

C. Ground three: **DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.**

Supporting FACTS (state *briefly* without citing cases or law): Attorney Eric Fong was ineffective as counsel, by (1) not moving to suppress the "GPS" tracking device that was used as evidence against Movant, the device was installed by Police without a valid warrant, without Movant's consent, and without the approval of a neutral magistrate; and (2) not having self confidence and to ask the jury to consider counsel fearfulness, counsel explained that his fearfulness was because the Movant's case was his first trial defense, with this statement in open court, counsel demonstrated a lack of effectiveness, all this conduct was unreasonable under Sixth Amendment.

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D. Ground four: **DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.**

Supporting FACTS (state *briefly* without citing cases or law): Attorney Eric Fong was ineffective as counsel, because he failed to keep the Movant informed regarding the status of the writ of certiorari at the U.S. Supreme Court, the U.S. Supreme Court denied the writ of certiorari on November 15, 2010, the counsel did not advise Movant of the denial until March 10, 2011, this unreasonable delay violated Model Rules 1.4, the conduct was unreasonable under the Sixth Amendment.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: C and D, ineffective assistance of

counsel cannot be presented in a direct appeal or writ of certiorari.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Russell V. Leonard., Federal Public Defender's Office (TAC)., 1331 Broadway., Ste. 400, Tacoma, WA 98402

(b) At arraignment and plea Russell V. Leonard., Federal Public Defender's Office (TAC)., 1331 Broadway., Ste. 400, Tacoma, WA 98402

(c) At trial Eric M. Fong., Fong Law, PLLC.
569 Division St., Ste. A., PT. Orchard, WA 98366

(d) At sentencing Eric M. Fong., Fong Law, PLLC.
569 Division St., Ste. A., PT. Orchard, WA 98366

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(e) On appeal Eric M. Fong., Fong Law, PLLC.569 Division St., Ste. A., PT. Orchard, WA 98366(f) In any post-conviction proceeding N/A(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒(a) If so, give name and location of court which imposed sentence to be served in the future: N/A(b) Give date and length of the above sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐ N/A

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

N/A

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

NOV 12 2011

(date)

Andres Hernandez-Vargas
Signature of Movant

Andres Hernandez-Vargas